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No. 94-1302

In The

SUPREME COURT OF THE UNITED STATES

October, 1994, Term

PETER A. CRAWFORD, Petitioner,

v.

CHARLES R. LAMANTIA et al., Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A. The "No Loss" theory adopted by the First Circuit below was central to distinguishing Crawford's case from *Sommers Drug Stores Co. Employee Profit Sharing Plan v. Corrigan*, 883 F.2d 345 (5th Cir. 1989).

The ESOP Trustees stated in their brief in opposition at page 12, that "[t]he putative "no loss" theory was never developed on the record, *was not necessary to the Court of Appeals' decision and was, at best, tangential to the Court's reasoning." (emphasis added).* To the contrary, after painstakingly repeating Crawford's argument that he fell within the second prong of *Firestone*, the Court distinguished the facts in Crawford from *Sommers* based on the "no loss" theory.

> Plaintiff does not contend that he has a reasonable expectation of returning to covered employment, instead he argues that he has a colorable claim to benefits as a former employee because, "but for" defendants' breach of fiduciary duty, he would have received additional vested benefits at the time he received his lump sum payment from the ESOP. Plaintiff reaches the conclusion in stages. First, he notes that, under 29 U.S.C. § 1109(a), fiduciaries who breach their fiduciary duties must make good to the plan any losses resulting from their breach. In this case, therefore, defendants would have to reimburse the plan the difference between the amount of money paid for the new shares of ADL stock and the true market value...[Pursuant to equitable powers granted by 29 U.S.C. § 1109(a) and] [r]elying upon *Sommers*, 883 F.2d at 350, Plaintiff's share should be calculated by dividing the number of the shares he received when he left (47) by the total number of shares 546,520 and multiply that fraction (.0008) by the overpayment.

Crawford v. LaMantia, 34 F.3d 28, 32-33 (1st Cir. 1994).

After stating Crawford's argument that he did not receive additional vested benefits due him by reason of the overpayment, the First Circuit distinguishes Crawford's claim from *Sommers* based solely on the "no loss" theory.

> Unlike the claimants in *Sommers*, Plaintiff has failed to show that Defendants' breach of fiduciary duty has a direct effect on his benefits...Had Defendants not overvalued the shares, they would not have borrowed as much money from ADL. Instead a recalculation of the price of the stock would have resulted only in a smaller loan, lower principal and interest payments, etc.. . .It would *not* have resulted in a smaller loan with any excess cash being distributed back to the Participants.

Id. at 33.

According to the First Circuit, Crawford did not suffer a loss of vested benefits when the ESOP Trustees paid too much for the ADL shares, by reason of the First Circuit's adoption of the "no loss" theory. Thus, the First Circuit has adopted a legal theory, the "no loss" theory, wholly without legal precedent or support and at odds with the "adequate consideration" guidelines set forth in the Statute (ERISA 408(e), 29 U.S.C. § 1108(e)).

> Such a policy would eviscerate the congressional intent behind protections entered for plan participants and would lead to the conclusion that an ESOP could participate in a

> leverage buyout and pay any price per share possible without suffering any loss no matter how clear the price. This renders the `adequate consideration' protection at 29 U.S.C. § 1108(e) a nullity.

Reich v. Valley National Bank of Arizona, 837 F. Supp. 1259 (S.D. N.Y. 1993).

B. Conflict Between the Circuits

Despite the ESOP Trustees' contention that this case does not present a conflict between the circuits, they failed to consider a whole line of cases such as *Kuper, Ruocco, Wright and Amalgamated* which all found standing for former employees in similar circumstances. Crawford reincorporates the argument set forth in pages 8-10 of his petition.

C. The Public Policy considerations favor granting this Petition for Certiorari.

The ESOP Trustees argue, at page 16 of their brief, that public policy considerations should dictate that Crawford be denied standing "the expansion Petitioner seeks would afford disconsolate former employees a potent *in terrorem* litigation weapon, without a countervailing benefit in enforcing the principles of ERISA."

In fact, there are public policy reasons supporting the broadened view of standing that Crawford has advocated. The Secretary of Labor sought to file an amicus brief with the First Circuit in this case. In its application for leave at A-50-51,

citing *Reich v. Valley Nat'l Bank*, 837 F. Supp 1259 (S.D. N.Y. 1993), the Secretary of Labor represented that:

...[I]t would be inconsistent with the structure and purpose of ERISA, and contrary to the "adequate consideration" requirement of ERISA 408(e), to hold that a leveraged ESOP can, in effect, pay any price per share for employer stock, no matter how high, without suffering a loss.

As the Secretary of Labor's application for leave was foreclosed at the First Circuit, only Crawford, a former employee with unpaid vested benefits, can advance the public policy concerns embodied in ERISA, that plan trustees not pay in excess of "adequate consideration" for employer stock.

C. Conclusion

For all the reasons set forth above, and in the Petition for Writ of Certiorari, Crawford requests that the Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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